BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

MELVA HUDSON	)	
Claimant	)	
VS.	)	
	)	Docket No. 1,005,332
INTEGRATED HEALTH SERVICES	)	
Respondent	)	
AND	)	
	)	
PACIFIC EMPLOYERS INSURANCE COMPANY	)	
Insurance Carrier	)	

ORDER

Respondent appeals the May 11, 2005 Award of Administrative Law Judge Bruce E. Moore. Claimant was awarded a 5 percent permanent partial impairment of function to the body as a whole, followed by a 14.75 percent permanent partial general disability based upon a 12.5 percent task loss and a 17 percent wage loss for injuries suffered through May 12, 2002. The Appeals Board (Board) heard oral argument on September 27, 2005.

APPEARANCES

Claimant appeared by her attorney, Lawrence M. Gurney of Wichita, Kansas. Respondent and its insurance carrier appeared by their attorney, Richard J. Liby of Wichita, Kansas.

RECORD AND STIPULATIONS

The Board has considered the record and adopts the stipulations contained in the Award of the Administrative Law Judge (ALJ).

ISSUES

1. What was claimant's average weekly wage on the date of accident?

2. What is the nature and extent of claimant's injury and disability?

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the entire evidentiary record contained herein, the Board finds the Award of the Administrative Law Judge should be affirmed.

The Award sets out findings of fact and conclusions of law in some detail and it is not necessary to repeat those herein. The Board adopts those findings and conclusions as its own.

Claimant suffered accidental injury through specific traumatic injuries on April 27, 2002, and through a series of injuries through May 12, 2002. The record is somewhat confusing regarding a specific date of accident, but the parties acknowledged at oral argument before the Board that the dates of accident adopted by the ALJ were appropriate and were not at issue before the Board.

While working for respondent as a CNA Trainee, claimant suffered specific traumatic injuries and also a series of incidents leading up to her May 12, 2002 last day worked with respondent. Claimant's injuries involved her neck, left shoulder and left arm down to the elbow. These injury-incidents were reported to her supervisors, and claimant continued performing her regular duties without seeking medical care. However, after May 12, 2002, claimant was unable to continue performing her duties and ultimately sought treatment from her personal physician, Merle J. Fieser, M.D. She was given light-duty restrictions on May 20, 2002, which respondent could not or would not accommodate. At that point, upon respondent's request, claimant executed a request for leave under the federal Family Medical Leave Act. Claimant was then examined and/or treated by several doctors, including Jane Drazek, M.D., Philip R. Mills, M.D., and C. Reiff Brown, M.D.

Dr. Mills, a physiatrist, first saw claimant on March 6, 2003. On April 16, 2003, he determined that claimant was at maximum medical improvement. Dr. Mills rated claimant under the fourth edition of the AMA *Guides*[1] at 5 percent impairment to the body as a whole, finding claimant fell within the cervicothoracic DRE category II. He recommended permanent work restrictions of no repetitive above shoulder level work.

Claimant was also examined at her attorney's request by C. Reiff Brown, M.D., a retired orthopedic surgeon, on June 26, 2003. Dr. Brown diagnosed claimant with cervical disc disease which preexisted the accidents, but which he determined was aggravated and rendered symptomatic by claimant's work-related accidents. Dr. Brown also found claimant had mild carpal tunnel syndrome in the right wrist, rating claimant at 5 percent impairment to the body as a whole for the cervicothoracic DRE category II injury and an additional 6 percent impairment to the body as a whole (10 percent to the right upper

[1] American Medical Association, *Guides to the Evaluation of Permanent Impairment* (4th ed.).

extremity) for the right carpal tunnel syndrome. The ALJ noted that while claimant discussed right upper extremity pain at the time of the regular hearing in March 2004, in her September 24, 2002 discovery deposition, claimant described the pain from her work-related accidents as being in the neck, between the shoulders and down the left arm. The ALJ found that claimant failed to prove that her right carpal tunnel syndrome arose out of and in the course of her employment. The ALJ, therefore, adopted the whole body ratings of 5 percent by both Dr. Mills and Dr. Brown, excluding the carpal tunnel syndrome rating. The Board, in reviewing the record, finds the evidence supports the ALJ's determination that claimant has a 5 percent impairment to the body as a whole on a functional basis as a result of the cervicothoracic spine injuries in April and May of 2002.

As noted above, respondent was unable or unwilling to meet the restrictions placed upon claimant when originally presented. However, in approximately August 2002, one of claimant's supervisors, identified only as Ray, contacted claimant by telephone and offered claimant a light-duty job doing percentage readouts. Claimant acknowledged that this is something that would be within her restrictions and claimant thought she could perform the activities. However, claimant had a previous commitment with a friend, where she would be unable to commence this job for approximately four days. Respondent's representative apparently determined that the four-day delay was unacceptable and hung up the phone. Claimant was not again contacted by respondent with any other offers of employment. Additionally, there is no indication in this record whether the offer of employment was at a comparable wage or at some wage different than that claimant was earning at the time of her original injuries.

Additionally, since leaving her employment with respondent, claimant has been involved in several short-term employment relationships, none of which proved lasting. Claimant's attempts at obtaining employment are scant at best, with claimant listing only a very few places at which she applied between her termination of employment in May of 2002 and the regular hearing in March of 2004.

Claimant was sent by her attorney to vocational expert Jerry D. Hardin, who prepared a task list showing the tasks that claimant had performed in her employment for the 15 years preceding her date of accident. This task list was presented to Dr. Brown, who opined that, of the one hundred thirty-two job tasks on the list, claimant was unable to perform twenty-seven, for a 20 percent task loss. However, the ALJ determined that the tasks listed under employment M were duplicates and, therefore, revised the total to one hundred twenty-two tasks, of which claimant was incapable of performing twenty-six, for a 21 percent task loss.

Claimant was also referred by respondent's attorney to vocational expert Karen Crist Terrill. Ms. Terrill also created a task list of claimant's former tasks, with this list being presented to Dr. Mills. Dr. Mills opined that of the eighty-three non-duplicate tasks on the list, claimant was unable to perform three, for a 4 percent task loss.

Claimant provided testimony regarding her employment and the wages she was paid. At the time of claimant's accident, she was earning $6.50 per hour and working between 35 and 40 hours per week. Claimant considered herself to be full-time and was receiving health insurance as a benefit. There is, however, no information in the record regarding whether claimant paid for this health insurance or whether it was provided by respondent and, if so, the amount of compensation involved in that health insurance program. The record also shows claimant earned average weekly overtime of $19.13.

In workers compensation litigation, it is the claimant's burden to prove her entitlement to benefits by a preponderance of the credible evidence.[2] With regard to claimant's average weekly wage, the Board finds, as did the ALJ, that claimant was a full-time employee working for respondent. Respondent contends that claimant's hours were limited to less than 40 hours per week, but claimant's testimony, which is uncontradicted by any other witness, was that she worked 35 to 40 hours per week on a regular basis. The wage statement verifies that claimant had weeks during her employment where she worked 40 hours per week, but the record is not clear as to how many weeks this actually occurred. Nevertheless, the Board finds claimant's testimony sufficiently convincing to find claimant a full-time employee. Therefore, under K.S.A. 2001 Supp. 44-511, the Board shall use 40 hours as constituting the minimum number of hours for computing the wage of a full-time hourly employee, as did the ALJ. $6.50 per hour times 40 hours equates to $260, which, when added to claimant's overtime of $19.13, results in a total gross average weekly wage of $279.13. This finding by the ALJ is affirmed by the Board.

With regard to claimant's functional impairment, the Board adopts the finding of the ALJ that claimant has a 5 percent impairment to the body as a whole pursuant to the opinions of both Dr. Mills and Dr. Brown. As noted above, this does exclude the rating by Dr. Brown for claimant's right upper extremity carpal tunnel syndrome. That condition is not supported by this record as being associated with claimant's work-related injuries.

K.S.A. 44-510e defines permanent partial general disability as,

> . . . the extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident, averaged together with the difference between the average

[2] K.S.A. 44-501 and K.S.A. 2001 Supp. 44-508(g).

> weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning after the injury.[3]

The ALJ, in considering the task opinions of both Dr. Brown and Dr. Mills, found no reason to give greater weight to one over the other. The Board agrees and averages Dr. Brown's 21 percent task loss opinion with Dr. Mills' 4 percent task loss opinion, for a 12.5 percent task loss pursuant to K.S.A. 44-510e.

The second part of K.S.A. 44-510e must be read in light of both *Foulk*[4] and *Copeland.*[5] In *Foulk*, the Kansas Court of Appeals held that a worker could not avoid the presumption against work disability as contained in K.S.A. 1988 Supp. 44-510e (the predecessor to the above quoted statute) by refusing an accommodated job that paid a comparable wage. In this instance, it is acknowledged that respondent offered claimant a job which would accommodate her restrictions. However, there is no indication in the record as to what salary was connected to that job offer. The Board cannot find, based upon this record, that claimant was offered a job which paid a wage comparable to that she earned at the time of the accident. Therefore, the policies set forth in *Foulk* do not apply to this situation. The Board further notes that the offer to claimant, which appeared to be a cold phone call by one of claimant's supervisors, was rather abrupt. When respondent was advised that claimant had a conflict and could not come back to work for four days, the telephone conversation was immediately terminated, with respondent making no additional attempts to re-employ claimant. The Board does not find this circumstance to constitute a legitimate offer by respondent. Instead, it appears as though the offer may have been made in bad faith by the employer, with little or no consideration given to claimant's willingness to return to work, although with a four-day delay.

In *Copeland*, the Kansas Court of Appeals held, for the purposes of the wage-loss prong of K.S.A. 44-510e (Furse 1993), that a worker's post-injury wage should be based upon the ability to earn wages, rather than the actual earnings, when the worker failed to make a good faith effort to find appropriate employment after recovering from the work-related accident.

> If a finding is made that a good faith effort has not been made, the factfinder *[sic]* will have to determine an appropriate post-injury wage based on all

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[3] K.S.A. 44-510e(a).

[4] *Foulk v. Colonial Terrace*, 20 Kan. App. 2d 277, 887 P.2d 140 (1994), *rev. denied* 257 Kan. 1091 (1995).

[5] *Copeland v. Johnson Group, Inc.*, 24 Kan. App. 2d 306, 944 P.2d 179 (1997).

> the evidence before it, including expert testimony concerning the capacity to earn wages.[6]

In this instance, the Board finds, as did the ALJ, that claimant has not put forth a good faith effort to obtain employment after leaving her employer. Claimant's identified job contacts are very limited and appear to come nowhere near the number of contacts which would be required in order to put forth a good faith effort. Claimant's ability to identify less than ten employers between Dr. Mills' release on April 16, 2003, and the regular hearing on March 10, 2004, is diminutive. The Board, therefore, finds claimant to be in violation of the policies set forth in *Copeland* and, as the finder of fact, will impute a post-injury wage.[7] The ALJ, in considering the opinions of Mr. Hardin and Ms. Terrill, who determined claimant's earning capacity to be between $206 and $260 per week, gave equal weight to the two opinions, imputing a wage of $233 per week. The Board, in reviewing the evidence, adopts that conclusion, which, when compared to claimant's $279.13 average weekly wage on the date of accident, results in a 17 percent wage loss.

The Board, therefore, finds that the Award of the ALJ, finding claimant to have suffered a 5 percent permanent partial impairment of function to the body as a whole, followed by a 14.75 percent permanent partial general disability should be, and is hereby, affirmed.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the May 11, 2005 Award of Administrative Law Judge Bruce E. Moore should be, and is hereby, affirmed in all regards.

IT IS SO ORDERED.

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[6] *Id.* at 320.

[7] K.S.A. 44-510e.

Dated this ____ day of October, 2005.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Lawrence M. Gurney, Attorney for Claimant
Richard J. Liby, Attorney for Respondent and its Insurance Carrier
Bruce E. Moore, Administrative Law Judge
Paula S. Greathouse, Workers Compensation Director